IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.111 OF 1999

1. Shri Rajendra Vassudev Porob Dessai
Deshprabhu Rauraje, son of Vassudev
Porob Dessai Deshprabhu Rauraje,
of full age, married, landlord,
resident of Pernem,
(since deceased represented by his legal heirs)

1.a. Dr. Vassudev Rajendra Deshprabhu

b. Miss Nayantara Rajendra Deshprabhu

2. Mrs. Aparna Porob Dessai Deshprabhu
Rauraje, wife of the plaintiff no. 1
of full age, married, housewife,
resident of Pernem. ..... Appellants
(Original Plaintiffs)

VERSUS

1. Smt. Sitadevi alias Jaya Raghuraj Deshprabhu,
of full age, housewife, resident of Pernem.

2. Shri Devendra Raghuraj Deshprabhu,
son of Raghuraj Deshprabhu,
of full age, married, landlord, resident of Pernem.

3. Mrs. Sunita Devendra Deshprabhu,
wife of Devendra Deshprabhu,
of full age, married, housewife,
resident of Indira Niwas, 60 Shivaji Park,
Keluskar Road, Bombay 400 028.

4. Shri Jitendra Raghuraj Deshprabhu,
son of Raghuraj Deshprabhu,
of full age, married, landlord, resident of Pernem.

5. Mrs. Rupa Jitendra Deshprabhu,
wife of Jitendra Deshprabhu,
of full age, married, resident of Pernem.

6. Mrs. Shilpa Satish Ugrankar,
wife of Dr. Satish Shripad Ugrankar,
of full age, married, resident of Ram Mahal,

Dinshaw Vacha Road, Churchgate,
Mumbai 400 020.

7. Dr. Satish Shripad Ugrankar,
son of Shripad Ugrankar,
of full age, married, Medical Practitioner,
resident of Ram Mahal, Dinshaw Vacha Road,
Churchgate, Mumbai 400 020.

8. Mrs. Devika Dilip Kulkarni,
of full age, married, housewife,
resident of Vastukar, Opp. K. Dhuru Road,
Prabhadevi, Mumbai 400 028.

9. Shri Dilip Mahabal Kulkarni,
of full age, married, resident of Vastukar,
Opp. K. Dhuru Road, Prabhadevi,
Mumbai 400 028. ..... Respondents
(Original Defendants)

Mr. S. D. Lotlikar, Senior Advocate with Ms. K. Sambari, advocate for the appellants.

Mr. J. P. Mulgaokar, advocate for the respondent nos.1, 2 and 4.

CORAM : R. M. LODHA, J.

DATE : 15th September, 2005.

ORAL JUDGMENT

This First Appeal is directed against the Judgment and Decree dated 21st July, 1999 passed by the IInd Additional Civil Judge, Senior Division, at Mapusa whereby the plaintiff's suit for declaration and correction of the revenue entry came to be dismissed. Brief facts first:-

Rajendra Vassudev Porob Dessai Deshprabhu Rauraje (the original plaintiff) alongwith his wife filed the suit in the court of the Civil Judge, Senior Division, Bardez, at Mapusa against the present respondents

(original defendants). The original plaintiff prayed that he be declared as exclusive owner of the suit property described in paragraph 1 of the plaint and that the entry in the office of City Survey, Mapusa in the name of the the late Raghuraj Vassudev Deshprabhu in respect of the suit property was an erroneous entry and should be corrected accordingly after cancelling the same. The original plaintiff averred that his grand-father Atmaram Vassudev Porob Dessai Deshprabhu was the owner of the suit property. Upon his death, the suit property came to be allotted in inventory proceedings to Vassudev Deshprabhu (the original plaintiff`s father). The husband of the defendant no.1 and the father of the defendant no.2 was the brother of the original plaintiff. By the Gift Deed dated 27th February, 1941 Vassudev Atmaram Porob Dessai Deshprabhu and his wife Sitadevi i.e. the father and the mother of the original plaintiff, gifted the suit property to him in exclusion of his brother Raghuraj Deshprabhu. It is the plaintiff`s case that the suit property pursuant to the Deed of Gift has been described and inscribed in the records of the Land Registration Office in his name. Later on, the original plaintiff came to know that in the City Survey record, the name of his brother Raghuraj is also recorded alongwith him though all along he was under the impression that the suit property was recorded in his name confirming his title in the suit property. His brother Raghuraj had died and the defendants are his legal representatives. According to the original plaintiff the defendants have no right whatsoever to the suit

property; the entry effected in the record of the City Survey in the joint name of the original plaintiff and his brother Raghuraj is an erroneous entry and that requires to be cancelled and corrected. The original plaintiff averred that it was in the month of June 1989 that for the first time he noticed that the title and possession of the suit property was in the name of the late Raghuraj Deshprabhu – his brother and that necessitated the filing of the present suit.

2. The defendants traversed the case set up by the original plaintiff in the plaint and raised the objection that the suit was barred by time as the possession of the late Raghuraj Vassudev Deshprabhu in the suit property was confirmed by Order dated 29th December, 1978 in the enquiry conducted by the Enquiry Officer, City Survey, Mapusa and that too on the strength of the statement made by the attorney of the original plaintiff. According to the defendants the limitation for the reliefs claimed in the suit commenced on 29th December, 1978 and the suit filed on 1st February, 1990 was barred by time. The defendants also set up the defence that the Deed of Gift dated 27th February, 1941 was never acted upon in respect of the suit property and that the Gift Deed and inscription made in the Land Registration Office at Bardez in the name of the original plaintiff was only on paper. The late Raghuraj was in possession of the suit property in his own right for more than 30 years. It was submitted that the late Raghuraj was the owner of the suit property and after his death, the defendants have

become owners.

3. The original plaintiff died during the pendency of the suit and his legal representatives were brought on record.

4. On the basis of the pleadings of the parties, the trial Court framed the following issues:-

> 1. Whether the plaintiffs prove that they are the owners in possessions of the suit property having been effectively gifted to the plaintiff no.1 and that the same is described and inscribed in the records of Land Registration office of Bardez Taluka in the name of plaintiff no.1?
>
> 2. Whether the plaintiffs prove that the entry in survey records of the name of late Raghunath Deshprabhu is an error and the same is liable to be deleted?
>
> 3. Whether the defendants prove that the suit is time barred?
>
> 4. Whether the defendants prove that the suit is barred by res-judeata (judicata)?
>
> 5. Whether the defendants prove that late Raghuraj has become the owner of the suit property by way of acquisitive prescription and adverse position?
>
> 6. What relief, What order?

5. In support of their case, one of the legal representatives of the original plaintiff viz., Vassudev Deshprabhu examined himself as P.W.1. The plaintiffs produced the land registration certificate Exh.P.2 alongwith the translation and extract of inventory proceedings Exh.P.3. The Deed of Gift alongwith the translation was produced as Exh.P.4. The order and survey plan alongwith Form B were collectively produced as Exh.P.5.

6. Insofar as the defendants are concerned, though they submitted the list of documents and along therewith placed on record the certified copy of the statement of the plaintiff's attorney that was recorded in the enquiry proceedings before the Enquiry Officer, City Survey, Mapusa and the survey plan, however, no oral evidence was led by the defendants.

7. The trial Court heard the learned counsel for the plaintiffs; nobody appeared for the defendants and by the Judgment and Decree dated 21st July, 1999, the trial Court dismissed the suit. The trial Court recorded the finding that the plaintiffs failed to prove that they were owners in possession of the suit property. The trial Court also recorded the finding that the plaintiffs failed to prove that the entry in the survey records in the name of Raghunath Deshprabhu was an error and the same was liable to be deleted. The trial Court held that the plaintiff's suit was barred by time. In the backdrop of these findings, as already noticed above, the trial court dismissed the plaintiffs' suit.

8. Mr. S. D. Lotlikar, the learned Senior Counsel for the appellant strenuously urged that the execution of the Gift Deed was not questioned by the defendants nor did the defendants question the recording of the said Deed of Gift in the register of notary. The learned counsel would submit that the inscription of the deed was admittedly made and once the inscription was made by virtue of Article 953 of the Portuguese Civil Code, there was transfer of possession in favour of the original plaintiff and, therefore, the finding of the trial Court on issue no.1 that the plaintiffs have failed to prove that they were owners in possession of the suit property was incorrect. The learned Senior Counsel would submit that the title of the suit property vested in the original plaintiff and that there was transfer of possession of the suit property in favour of the original plaintiff upon the Gift Deed having been described and inscribed; the entry in survey records in the name of his brother Raghuraj Deshprabhu was erroneous and liable to be corrected. The learned Senior Counsel contended that the entry in the survey records has been made on the basis of the order of the Enquiry Officer. The said Order of the Enquiry Officer is founded on the statement of Uttam Raghunath Naik , who purportedly acted on behalf of the original plaintiff as his attorney but had no authority to make a statement that the suit property was in occupation of Raghuraj. The statement of Uttam Raghunath Naik, the learned Senior Counsel submitted, could not bind the original plaintiff as it was beyond the authority given to him. Relying upon

the Goa, Daman and Diu Land Revenue City Survey Rules, 1969, (for short "the Rules of 1969") and particularly Rule 6, the learned Senior Counsel contended that the procedure for holding such enquiry was not followed and, therefore, the entry in the survey record was clearly erroneous and the learned trial Court ought to have cancelled the same. Assailing the finding of the trial Court that the suit was beyond the period of limitation, the learned Senior Counsel would submit that the original plaintiff came to know for the first time in the month of June, 1989 that the suit property is recorded/surveyed in the joint name of his brother Raghurai alongwith him and immediately thereafter in the month of February, 1990 the suit was filed and, therefore, it cannot be said that the suit was beyond limitation.

9. Mr. J. P. Mulgaokar, the learned counsel for the respondents no.1, 2 and 4 did agree that the finding on issue no.1 recorded by the trial Court needs to be modified inasmuch as for want of any evidence to the contrary by the defendants, the factum of the Gift Deed having been executed and recorded in the register of notary, the inscription having been made and the vesting of the title in the original plaintiff in respect of the subject suit property has to be accepted. He, however, submitted that the suit basically was a suit for declaration that the entry made in the office of the City Survey in the name of the late Raghuraj Deshprabhu in respect of the suit property be cancelled and corrected being an erroneous entry. The learned counsel would submit that except the bald statement in the plaint

that the entry was erroneous, no grounds have been set up as to how and why the said entry was erroneous. He would submit that the subject entry was recorded on the strength of the statement made by a person none other than the original plaintiff's attorney. That Uttam Raghunath Naik was the power of attorney of the original plaintiff is clearly established from the evidence of P.W.1. The said attorney unequivocally stated before the enquiry officer that Raghuraj Vassudev Deshprabhu son of Vassudev Atmaram Deshperabhu was in possession of the subject property and looking after the same and that his possession (Raghuraj's possession) in connection with the said property may be considered. On the face of the statement of Uttam R. Naik, if the enquiry officer held that Raghuraj Deshprabhu was in possession of the suit property and made entry to that effect in the City Survey record, such entry cannot be faulted. Moreover, the learned counsel submitted that the entry was recorded way back on 29th December, 1978 but the suit was filed only in the month of February 1990 by the original plaintiff. The learned counsel would contend that the suit was clearly barred by time and the trial Judge cannot be said to have erred in holding so. He, thus, supported the decision of the trial Court whereby the original plaintiff's suit came to be dismissed.

10. In the light of the position admitted by the learned counsel for the respondents, the discussion with regard to issue no.1 must not detain me for a long. The learned counsel for the respondents admitted that there

was no evidence led by the defendants in challenging the execution of the Gift Deed dated 27th February, 1941 by Vassudev Atmara Deshprabhu and his wife in favour of the original plaintiff and that the Gift Deed was recorded in the register of notary. He also admitted that the Deed of Gift was inscribed and, upon inscription, the original plaintiff became owner of the suit property. In this view of the admitted position, the finding recorded by the trial Court on issue no.1 is modified and it must be held that the original plaintiff proved his ownership over the suit property.

11. The core issue is issue no.2 whereby the plaintiffs claim that the entry in the survey record of the name of the late Raghuraj Deshprabhu was an error. The Order dated 29th December, 1978 passed by the Enquiry Officer, City Survey, Mapusa, regarding which there is no dispute reads thus:-

> "Whereas in accordance with a notice duly served under rule 2(2) of the Goa, Daman and Diu Land Revenue Inquiry into Title of Land Rules, 1969 an inquiry was held by me on 21-10-78 and an order was passed on 29-12-78.
>
> Notice is hereby given to all persons concerned and to (here specify the person to whom this notice is directed) Shri Rajendra V. Deshprabhu, Pernem, that my decision and order is that : (here summarize the order and define the property or right to which it relates).

ORDER

The claim put forth by Shri Rajendra V. Deshprabhu, from Pernem, through his power of Attorney Shri Uttam R. N. Dessai in respect to the property shown under Chalta No.3 of P.T. Sheet No.86 of City Survey Mapusa was enquired into and it was found that the same belongs to Shri Vassudeva A. P. D. Deshprabhu as per certificate issued by the Secretary of Administracao of Bardez Comunidade. The said Uttam stated that through the property is registered in the name of late Shri Vassudeva A. P. D. Deshprabhu at present, his son Shri Raghuraj V. Deshprabhu is in possession. He stated also that the same property is free from any encumbrance being its area to the extent of 2.000 sq.mts. (two thousand only).

Hence, the title, of late Shri Vassudeva A. P. D. Deshprabhu, from Pernem, to the property shown under Chalta No.3 of P.T. Sheet No.86, as owner, is hereby confirmed. Similarly, the possession of Shri Raghuraj V. Deshprabhu, as occupant is hereby confirmed.

Given under my hand and seal of this office; and

Dated this 29th day of December, 1978.

Sd/- 29-12-78

A.M. Deshprabhu

Collector or Survey Officer

Enquiry Officer
City Survey Mapusa
Mapusa-Goa”

12. A perusal thereof would show that before passing the said order the notice was duly issued and served under Rule 2(2) of the Goa, Daman and Diu Land Revenue (Enquiry Into Title of Land) Rules 1969 upon the original plaintiff Rajendra V. Deshprabhu as well as his brother Raghuraj V. Deshprabhu. The enquiry was held on 21st October, 1978 i.e. before passing the order on 29th December, 1978. Before the enquiry officer, the original plaintiff put forth his claim through Uttam R. N. Dessai as his power of attorney. It is too late in the day now to contend that Uttam R.N. Dessai was not the original plaintiff's power of attorney or that the statement made by him before the enquiry officer was not binding. As a matter of fact, P.W.1 in his deposition admitted that the entry in the survey records was made on the admission of his late father's attorney before the enquiry officer, City Survey. Though P.W.1 deposed that the said attorney appeared without his father's instructions, he admitted in cross-examination that even after the enquiry proceedings the said attorney Uttam R. N. Desai acted on behalf of his father. If Uttam R. N. Desai was not the authorized attorney of the original plaintiff and if he made any statement before the enquiry officer for which he was not authorized to make, it does not stand to reason that the original plaintiff would have permitted Uttam R. N. Desai to act on his behalf even after the enquiry proceedings. As a matter of fact, the notice of the enquiry was served upon the original plaintiff Rajendra V. Deshprabhu. He put forth his claim through his power of attorney Uttam

R.N. Desai. Uttam R. N. Dessai appeared on his behalf either he would have appeared pursuant to the notice that was issued. In the circumstances it has to be held that Uttam R. N. Desai appeared in the enquiry proceedings before the enquiry officer only on instructions of the original plaintiff Rajendra Deshprabhu. The said attorney Uttam R. N. Desai as is reflected from the Order dated 29th December, 1978, made a categorical and unequivocal statement that the suit property was in possession of Raghuraj V. Deshprabhu (son of Vassudev Atmaram Dessai Deshprabhu). The contention of the learned Senior Counsel for the appellants that the burden lay on the respondents to prove that Uttam R. N. Desai was the power of attorney of the original plaintiff and that he was authorized to make statement on behalf of the original plaintiff is fallacious. How could the respondent prove the relationship of the master and agent between the original plaintiff and Uttam R. N. Desai or the extent of authority given by the original plaintiff to his attorney? The relationship of principal and agent was within the exclusive knowledge of the original plaintiff and his attorney Uttam R. N. Dessai and could not have been proved by the respondents. The circumstances speak for themselves. The fact of the matter is and that this is not challenged by P.W. 1 in his evidence that Uttam R. N. Desai was one of the power of attorneys of the original plaintiff. Not only that the said power of attorney acted on behalf of the original plaintiff before or at the time of enquiry proceedings, but he also acted as power of attorney of the

original plaintiff after the enquiry proceedings. Moreover, the statement of the said Uttam R. N. Desai in the enquiry proceeding was recorded on 21st October 1978. At no point of time until his death in the year 1994, the original plaintiff challenged the statement of the said attorney Uttam R. N. Desai made before the enquiry officer. The plaint is totally silent. In the plaint there is no averment that the statement made by Uttam R. N. Desai before the enquiry officer was unauthorized or beyond the authority given to him. It is not that the original plaintiff did not come to know of the statement of his attorney Uttam R. N. Desai recorded before the enquiry officer prior to the filing of the suit. Para 6 of the plaint indicates that before filing the suit the original plaintiff inspected the file and found the name of Raghuraj being recorded alongwith him and that necessitated the filing of the suit. If Uttam R. N. Desai (his attorney) made some statement which was not authorized obviously in the plaint the original plaintiff would have challenged the correctness of the statement of Uttam R. N. Desai made before the enquiry officer. I, accordingly, reject the submission of the learned Senior Counsel that the statement of Uttam R. N. Desai made before the enquiry officer was not authorized or it exceeded the authority given to him by the original plaintiff.

13. As regards Article 953, Portuguese Civil Code which is relied on by the learned Senior Counsel that upon the inscription of the Deed of Gift in the register, there was transfer of possession in favour of the original

plaintiff, suffice it to say that Article 953 provides for de-jure transfer of possession in favour of a person in whose favour inscription and registration of title of conveyance has been made. Article 953 does not speak of de facto possession. The plaintiffs have miserably failed to prove that the original plaintiff came into actual physical possession of the suit property upon inscription of the Gift Deed. As a matter of fact and as already indicated above, it was admitted by the original plaintiff's own power of attorney holder that the suit property was in occupation and possession of Raghuraj. This statement was made way back in the year 1978. In this view of the matter it is very difficult to hold that on inscription of the Gift Deed the original plaintiff came into actual physical possession of the suit property.

14. Though the learned Senior Counsel submitted that the procedure as contemplated in Rule 6 of the Rules of 1969 was not followed while holding the enquiry and that the entry was erroneous, I find that no pleading to that effect has been made in the plaint. There was no issue raised as there was no pleading regarding non-compliance of Rule 6 of the Rules of 1969. This argument of the learned Senior Counsel is noted to be rejected.

15. Now remains the issue of limitation.

16. The prayers in the suit are thus:-

> a)That by judgment, decree it may be declared that the plaintiffs are the exclusive owners of the suit property;
>
> b) That by judgment, decree and order it may be declared that the entry in the office of City Survey, Mapusa of the name of late Raghuraj Deshprabhu in respect of P.T. Sheet No. of Chalta no. is an erroneous entry and it should be correct ed accordingly thereby canceling the same.

17. A close look at the said prayers would show that both the prayers are prayers relating to declaration. Though the entry in the City Survey record of which declaration is sought was made on 29th December, 1978, the suit came to be filed on 1st February, 1990. In paragraph 6, except a vague statement that to the surprise of the original plaintiff, it was noticed some time back when the plaintiffs inspected the file in the City Survey office and found that the name of Raghuraj was recorded alongwith original plaintiff, there is no specific date given. In paragraph 13 though it is averred that the cause of action arose in the month of June 1989, the same cannot be accepted for want of specific date on which the plaintiff came to know that the name of his brother Raghuraj was also recorded alongwith him. The limitation for the relief of declaration as prayed for by the plaintiffs is covered by Article 58 of the Limitation Act, 1963, which provides for three years when the right to sue first accrues. Apparently, the

suit is barred by time. The subject entry was recorded on 29th December, 1978. There is no specific date mentioned in the plaint as to on what date the original plaintiff came to know of the said entry. It has to be presumed in the circumstances that the original plaintiff was aware of the said entry when it came to be made in the year 1978 or immediately thereafter. However, the suit was filed in the year 1990 which is clearly barred by time. I concur with the view of the trial Court that the suit is barred by time.

18. In the result, the Judgment and Decree passed by the trial Court dismissing the plaintiff's suit is maintained save and except the modification of finding on issue no.1 as indicated in the Judgment.

19. No costs.

R. M. LODHA, J.

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